In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 26

UNITED STATES OF AMERICA, PETITIONER

v.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI, AND JOSEPH V. PERRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

Respondents' brief admits (p. 8) that the "Government's evidence was sufficient to show that the defendants employed third-degree methods, and there was no evidence offered in denial of this." They argue, however (pp. 13, 26-27), that:

> Third-degree methods have been openly employed by police departments in various sections of the country for years. * * *
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> * * * * * *
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> The fact that such police methods have been employed for years by numerous po-

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lice departments in various sections of the country is no secret. It is generally known. It would have been known by the defendants. It is and has been known to this Court by reason of the numerous cases involving confessions obtained by such methods which are presented to the Supreme Court.

Surely the Department of Justice has known for many years that third-degree methods have been employed.

The enforcement officers of the Government enjoy an enviable reputation for their perseverance, thoroughness, and success in detecting the commission of federal offenses and in bringing the perpetrators to justice. Such a reputation would not be unknown to the defendants below. And yet, we fail to find where the Government has attempted to utilize the provisions of Section 19 to punish police officers for employing third-degree methods up to the time of the present case except in the Screws case * * *.

Would not the fact that such practices have gone unnoticed by the officers charged with enforcement for some seventy-five years be reason enough for an ordinarily prudent man to believe that the employment of third-degree police methods does not constitute an offense under this section?

This argument is based on a misconception of the intent or state of mind required for guilt under Sections 19 and 20. As was shown in our

main brief (pp. 49–52), and is more fully developed herein, the use of third-degree methods by police officers acting in the pursuit of their duties is, in and of itself, a denial of due process of law; and this Court in numerous cases has so stated, in specific, express terms. An officer who deliberately employs such inquisitorial methods in violation of rights which this Court has held to be secured by the due process clause of the Fourteenth Amendment gains no immunity from prosecution under Sections 19 and 20 because he mistakenly believes that no action will be taken against him. Mr. Justice Douglas' opinion in the Screws case (325 U. S. 91, 105) gives the incisive answer to respondents' contention:

> * * * willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something.[1]

[1] "* * * Section 20 strikes only at abuse of official functions by state officers. It does not reach out for crimes done by men in general. Not murder per se, but murder by state officers in the course of official conduct and done with the aid of state power, is outlawed. These facts, inherent in the crime, give all the warning constitutionally required. For

This Court has left no doubt that "implicit in the concept of ordered liberty", and hence secured by the Fourteenth Amendment (*Palko* v. *Connecticut,* 302 U. S. 319, 325; *Wolf* v. *Colorado,* 338 U. S. 25, 26–27), is the right of persons accused of crime to be tried and punished fairly and according to law, and not by third-degree methods. "Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand." *Brown* v. *Mississippi,* 297 U. S. 278, 285–286.

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one, so situated, who goes so far in misconduct can have no excuse of innocence or ignorance.

"Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it." (Mr. Justice Rutledge, p. 129.)

"* * * Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation. No appreciable amount of intelligence or conjecture on the part of the lowliest state official is needed for him to realize that fact; nor should it surprise him to find out that the Constitution protects persons from his reckless disregard of human life and that statutes punish him therefor. To subject a state official to punishment under § 20 for such acts is not to penalize him without fair and definite warning. Rather it is to uphold elementary standards of decency and to make American principles of law and our constitutional guarantees mean something more than pious rhetoric." (Mr. Justice Murphy, pp. 136–137.)

The decisions of this Court holding that the Fourteenth Amendment forbids admission in evidence against a defendant of a confession extorted from him by compulsion, physical or mental, do not rest on any narrow ground that such evidence lacks probative value. The Court in these cases was not establishing a mere rule of evidence. As the opinions clearly show, these cases are based rather upon application of a first principle of constitutional law, namely, that due process of law requires that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U. S. 312, 316; and see *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. Confessions obtained by methods which are fundamentally unfair and "revolting to the sense of justice" (*Brown* v. *Mississippi, supra*, at 286) are *ipso facto* inadmissible in evidence, regardless of their "voluntariness". The Court's opinions have established that due process forbids not merely the use in evidence of confessions coerced by brutal police methods; it forbids such coercion in and of itself. The *Palko* opinion recognized (p. 326) that ordered liberty implies "the need to give protection against torture, physical or mental."

In *Chambers* v. *Florida*, 309 U. S. 227, 240–241, the Court said:

> We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end.

In *Haley* v. *Ohio*, 332 U. S. 596, 599, 601, Mr. Justice Douglas stated:

> We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands.
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> * * * this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.
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> * * * Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.
>
> * * * The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them.

In that case Mr. Justice Frankfurter wrote in his concurring opinion as follows (pp. 603–604, 605–606):

> * * * it cannot be too often repeated that the limitations which the Due Process Clause of the Fourteenth Amendment placed upon the methods by which the States may prosecute for crime cannot be more narrowly conceived. This Court must give the freest possible scope to States in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community. * * *
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> * * * An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry. Disinterested zeal for the public good does not assure either wisdom or right in the methods it pursues. A report of President Hoover's National Commission on Law Observance and Enforcement gave proof of the fact, unfortunately, that these potentialities of abuse were not the imaginings of mawkish senti-

> mentality, nor their tolerance desirable or necessary for a stern policy against crime. Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long-continued interrogation violates sentiments deeply embedded in the feelings of our people.

In *Watts* v. *Indiana,* 338 U. S. 49, the opinion of Mr. Justice Frankfurter stated (pp. 53–54, 55):

> * * * We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.
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> In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure

> before liberty is curtailed or life is taken. We are deeply mindful of the anguishing problems which the incidence of crime presents to the States. But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case. See, *e. g.*, Radzinowicz, A History of English Criminal Law and its Administration from 1750, *passim* (1948). Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective.

And members of the Court who have disagreed with particular dispositions have agreed on the general principle. See, *e. g.*, Mr. Justice Jackson's opinion in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 159:

> * * * The Constitution requires that a conviction rest on a fair trial. Forced confessions are ruled out of a fair trial. They are ruled out because they have been wrung from a prisoner by measures which are offensive to concepts of fundamental fairness.

Unquestionably, therefore, respondents' third-degree methods in this case were plainly in violation of fundamental rights secured to their vic-

tims by the Fourteenth Amendment.[2] And since such rights have been made specific and definite by numerous decisions interpreting the Amendment, they are protected by Sections 19 and 20; and one who acts "in open defiance or in reckless disregard" of the constitutional requirement is "not punished for violating an unknowable something." (Opinion of Douglas, J., in *Screws*, p. 105.) Hence it is immaterial that respondents may have relied upon a belief that they would not be held liable for their actions because others equally guilty may have escaped prosecution under the statute. Even if the facts as to the widespread use of the third-degree are as asserted by respondents, this surely gives them no defense for their criminal acts. It is elementary that a failure to catch or prosecute some violators of a law does not immunize those who are prosecuted; nor does it in any way affect the scope of the statute. "Failure to enforce the law does not change it." *Louisville & N. R. Co.* v. *United*

[2] This would appear to be an *a fortiori* conclusion from *Wolf* v. *Colorado*, 338 U. S. 25, holding that the Fourteenth Amendment protects one from an unreasonable search and seizure by state officers. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Id.*, pp. 27–28. It could hardly be suggested that the security of one's person against arbitrary beatings by the police for the purpose of obtaining a "confession" is less indispensable to a free society.

States, 282 U. S. 740, 759; and see *Kelly* v. *Washington,* 302 U. S. 1, 14; *Chicago, B. & Q. R. Co.* v. *Iowa,* 94 U. S. 155, 162; *Homer & Son* v. *Commonwealth,* 106 Pa. St. 221; *Costello* v. *Palmer,* 20 App. D. C. 210, 220.

II

Respondents state (p. 23) that the debates in Congress concerning enactment of the Enforcement Act of May 31, 1870, 16 Stat. 140, show that Section 6 of that Act, which is the original form of Section 19 of the Criminal Code, "was adopted solely for the purpose of protecting the rights secured by the Fifteenth Amendment."

This statement is true only of the bill (H. R. 1293, 41st Cong., 2d Sess.) as passed by the House, which dealt only with the question of suffrage. See Flack, *Adoption of the Fourteenth Amendment,* p. 219. The legislation was substantially altered, however, during the course of its consideration in the Senate. Numerous amendments, including Section 6, were introduced. We have quoted in our main brief (pp. 28–31) the statements of Senator Pool, who introduced Section 6 and other amendments, which evince a purpose of broadening the legislation to protect not only voting rights under the Fifteenth Amendment but all other rights secured by the Constitution, and in this connection the Senator particularly referred to the Fourteenth Amendment.

Other references to the Fourteenth Amendment appear in the debates. In view of the general character of these remarks, most of which were not specifically related to any particular provision, it cannot be categorically stated that, apart from Senator Pool's remarks, the debates disclose a clear Congressional recognition that Section 6 embraced the rights of life and liberty newly secured by the Fourteenth Amendment. But it cannot be doubted that both its proponents and opponents recognized that the Enforcement Act, as amended in the Senate and finally passed, had an extremely broad scope, and that it included provisions enforcing the Fourteenth Amendment.

In addition to Section 6, other amendments made by the Senate included a provision that all persons within the United States shall have the same legal rights in every State and Territory as white citizens (sec. 16), and that deprivation of such rights under color of law shall be criminal (sec. 17, which later became Section 20 of the Criminal Code); reenactment of the Civil Rights Act of 1866, 14 Stat. 27 (sec. 18); and provisions for removal and punishment of persons holding office in violation of Section 3 of the Fourteenth Amendment (secs. 14, 15). In almost every instance the debates are not clear as to which of these provisions, or Section 6, reference is being made. But considered in their entirety, these allusions to the Fourteenth Amendment, which are

set forth below as they appear in the Congressional Globe (41st Cong., 2d Sess.), demonstrate that no support can be found in its legislative history for the notion that the only constitutional rights intended to be secured by Section 6 were voting rights of citizens:

Senator Williams (p. 3656):

> The Senator from Nevada [Mr. Stewart] proposes a bill to enforce the fifteenth amendment, and upon that he piles another bill which is intended to enforce the fourteenth amendment, and upon that he piles another which is intended to protect citizens in the enjoyment of their civil rights; and this conglomerated mass of incongruities and uncertainties is to be put through here in the name of a bill to enforce the fifteenth amendment!

Senator Stewart (p. 3658):

> The Senator from Oregon [Mr. Williams] has objected several times to the additions that are made to this Senate bill * * *. One of them is simply a requirement that all citizens shall obey the fourteenth amendment and shall not violate the provisions of that amendment while it is in force. Everybody wants that amendment enforced while it is in force, both those who are in favor of amnesty and those who are opposed to amnesty.

Senator Stewart then said, referring to that part of the bill relating to the equal protection of the laws (p. 3658):

> Why is not this bill a good place in which to put that provision? Why should we not put in this bill a measure to enforce both the fourteenth and fifteenth amendments at once? * * * The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws. Your treaty [with the Chinese] says that they shall have the equal protection of the laws.

* * * * *

Senator Thurman (p. 3672):

> * * * We thought we were to act upon a bill simply to enforce the fifteenth amendment; but that bill was hardly before the Senate before the Senator introduced an amendment to enforce the fourteenth amendment. * * *

At the end of an all-night debate, the Senate passed the Enforcement Bill at 7 a. m., May 21, 1870. See Flack, *supra*, p. 222. After the passage of the bill, the following colloquy occurred (p. 3690):

> *Mr. Stewart:* I move to amend the title by adding "and for other purposes."
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> *Mr. Sumner:* It would be better to strike out all the words after "Union."
>
> *Mr. Trumbull:* Let it be read as it will stand if amended as proposed.

Mr. Sumner: It will then read, "A bill to enforce the right of citizens of the United States to vote in the several States of this Union."

Mr. Stewart: Add there the words "and for other purposes."

Mr. Sumner: Why do you want to have "other purposes" in?

Mr. Stewart: Here is a provision to enforce the fourteenth amendment. Strike out all after "Union" and insert "and for other purposes."

Mr. Trumbull: I think the title proposed by the Senator from Massachusetts would indicate the purpose of the bill better; and then put on "for other purposes."

Mr. Stewart: That is what I want. * * *

Mr. Trumbull: Read it, then, as it will read if amended.

The Chief Clerk: If amended as proposed the title will read: "A bill to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes."

Mr. Sumner: That is the whole case.

Mr. Stewart: No; the fourteenth amendment, to prevent improper holding of office, and then the civil rights bill have been put on.

Mr. Sumner: Yes.

Mr. Stewart: So after Union insert "and for other purposes."

The title was so amended.[3]

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[3] See *United States* v. *Classic*, 313 U. S. 299, 328, note 10.

After the legislation went to conference, Representative Bingham, of Ohio, in explaining the conference report to the House, said (p. 3871):

> * * * The House is doubtless aware that the Senate amendment, which was the subject of the conference, included substantially all that had been embraced in the bill reported to this House by the Judiciary Committee, and which had received the approval of the House. In addition to that, the Senate amendment contained various provisions for the enforcement of certain sections of the fourteenth article of the amendments to the Constitution.

Representative Beck, of Kentucky, said (p. 3874):

> * * * The bill which left us was simply a bill to enforce the fifteenth amendment, and we had a right to suppose * * * [Mr. Bingham] would insist on maintaining it in that form; instead of that it is abandoned, and he urges us to pass this bill of abominations * * * which pretends to reënact the infamous civil rights bill, and enforce the fourteenth as well as the fifteenth amendment. * * *
>
> * * * Under pretense of enforcing the fourteenth amendment the fifteenth section of this act imposes fines * * * against all persons whom the courts may think hold any office, however insignificant, in violation of that amendment.

Representative Davis said (p. 3881):

> What does this bill seek to do, Mr. Speaker? It has within its scope three important objects to enforce the provisions, or one provision, of the fourteenth article of amendments.
>
> Another object is to enforce the provisions of the fifteenth article of amendments * * *.

III

Respondents' brief (p. 44) concedes that "the trial Court did cover the question of specific intent in his charge to the jury even though he refused to use the words 'wilful' or 'wilfully'." As was pointed out in our main brief (pp. 66–68), the court expressly and repeatedly instructed the jury that it was not enough for the Government to prove that there was a conspiracy to do the acts alleged, and that the defendants had "a bad motive" or "a general intent to do * * * wrong", but that in order to convict, the jury had to find "that the defendants had in mind the specific purpose of depriving the complaining witnesses of those rights" enumerated in the indictment.

Respondents argue, however, that these instructions as to specific intent might not have been understood by the jury because at an earlier point in the charge the court, in defining gener-

ally the nature of a criminal conspiracy, said (R. 320):

> * * * While the parties to a conspiracy, if there is one, should be working together understandingly, this does not mean that they would understand that what they were doing would be a violation of law. All that is necessary is that they should understand what they are doing. If what they thus understandingly cooperate to do is a violation of law, in this case a deprivation of constitutional rights, then the conspiracy will have been established, even though the participants did not know that what they were doing would in fact be deemed to have been a deprivation or violation of any person's constitutional rights.

The record shows that while this instruction was requested by the Government (R. 275), the defendants made no objection to it during the colloquy between court and counsel preceding the charge, in which the various instructions requested by both sides were discussed (R. 290–305). The Assistant United States Attorney, on the other hand, did object to the instruction requested by the defendants (R. 278) that in order to convict, the jury had to find that the defendants had in mind the specific purpose of depriving the complaining witnesses of their constitutional rights. The trial court overruled such objection (R. 297), and the instructions on

intent given the jury were as requested by the defendants (R. 322; and see also R. 323, 326–330). At no point in the entire discussion preceding the charge (R. 290–314) did any of the counsel for the defendants object to the portion of the charge which is now criticized (R. 320) or suggest to the trial court that it was inconsistent with the other instructions regarding "specific intent".

After the charge was given the trial court asked both Government and defense counsel whether they had any exceptions to the charge (R. 334, 335). The Government prosecutor stated that he thought the Court's reiteration of the "specific intent" requirement "must necessarily have impressed the jury that the Court was emphasizing those things", and that this was a "rather prejudicial method of charging" (R. 335). The court overruled this exception (R. 337). But counsel for the defendants expressed no objection whatsoever to any of the instructions regarding intent, and in no way indicated that they thought the instructions given were inconsistent or in any respect prejudicial to the defense (R. 335–336).

It is clear, therefore, that the prejudicial error of which respondents now complain is nowhere reflected in the contemporaneous record of the trial. Construed, as it must have been by the jury, in the context of the charge as a whole, which contained repeated references to the re-

quirement of "specific intent," this particular instruction could not have misled the jury as to the necessity for finding "specific intent" as a prerequisite to conviction. The record shows that at the trial, when the judge might have corrected any possible error had they called his attention to it, defense counsel never raised any objections to this portion of the charge. On the contrary, the only complaint to the "intent" portion of the charge (apart from the defendants' objection to the court's failure to use the word "willful") was made by the Government prosecutor, and on the ground that it was too favorable to the defense. The court overruled such objection, and the matter rested there. No one, on either side, proposed to the trial judge that he should delete or withdraw the portion now asserted to be inconsistent with the remainder. Indeed, as respondents admit (Br. 44), they did not assign this point as error or include it in the twenty-eight points on which they relied in the court below (R. 374–377).

In these circumstances we believe the following is pertinent here: "It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. * * *. This was obviously a lawyer's afterthought. It does not pro-

mote respect for the Bill of Rights to turn such an afterthought into an imaginary injury that is reflected nowhere in the contemporaneous record of the trial, and make it the basis for reversal." *Glasser* v. *United States*, 315 U. S. 60, 88–89 (dissent).

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

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